Supreme Court, U.S.
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No. 99-1356

IN THE

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

v.

SWIFT TRANSPORTATION COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT EDDIE LEE TIGGS

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STATEMENT OF THE CASE

A. Statement of Facts

Petitioners' Statement of Facts (Pet., pp. 3-4) is a self-serving declaration of their view of the facts and their actions. Nonetheless, Respondent Tiggs will accept the Statement of Facts regarding the Levys' own actions for the purposes of this Petition, only. Notwithstanding, Tiggs has consistently denied, and continues to deny, any knowledge of, or participation in, the accident which Petitioners maintain is the basis for their lawsuit.

B. Proceedings Below

Petitioners initially cite their first Complaint filed on June 6, 1997[1] and correctly note that in that case they invoked federal jurisdiction claiming diversity of citizenship under 28 U.S.C. § 1332, and supplemental jurisdiction under 28 U.S.C. § 1367. Pet., p. 5.

In the initial Complaint, and every subsequent or proposed amended complaint in that lawsuit, their second federal case,[2] and their state court lawsuit,[3] Petitioners'

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1. *Levy v. Swift, et al.*, CV-97-777 SC/JHG, U.S. District Court, District of New Mexico (*Levy I*) (*see*, Pet., p. 5).

2. *Levy v. Swift et al.*, CV-98-578 LH/WWD, U.S. District Court, District of New Mexico, filed May 15, 1998 (*Levy II*) (*see*, Pet., p. 5).

3. *Levy v. Swift et al.*, CV-99-90, Third Judicial District Court, State of New Mexico, filed January 28, 1999 (*Levy III*) (*see*, Pet., p. 6, fn. 1).

jurisdictional allegations regarding their residence and that of Tiggs has been the same: Levys are residents of Texas;[4] so is Tiggs.[5] Petitioners have now properly dropped their diversity claim. Pet., p. 2, "Basis for Federal Jurisdiction in the Court of First Instance."

Petitioners now rely exclusively on jurisdiction under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). They also seek supplemental jurisdiction over purely state law claims under 28 U.S.C. § 1367. Pet., p. 2.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE RECEIVED ALL THE PROCESS THEY ARE DUE; THE FEDERAL COURTS HAVE NO JURISDICTION TO GIVE THEM MORE.

Petitioners erroneously assert that their case has been "adjudicated." Pet., p. 9 (headnote). There has been no adjudication on the merits because the federal courts have never had jurisdiction to decide the case.

There is also severe question whether Petitioners have properly appealed the lower courts' decision that there is no

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4. *Levy I*: Compl., ¶ 4; Petitioners' proposed First Amended Complaint, ¶ 4 (attached to Mtn. for Lv. to File Am. Compl.). *Levy II*: Petitioners' original Compl., ¶ 4; First Am. Compl., ¶ 4. *Levy III*: Civil Compl., ¶ 4.

5. *Levy I*: Compl., ¶ 9; Petitioners' proposed First Am. Compl., ¶ 9, attached to Mtn. for Lv. to File Am. Compl. *Levy II*: Petitioners' original Compl., ¶ 9; Petitioners' First Am. Compl., ¶ 9. *Levy II*: Compl., ¶ 9.

jurisdiction under the FTCA. The district court dismissed the United States and Central Intelligence Agency for lack of FTCA jurisdiction. Pet., Appendix B, pp. 10a-14a. Although Petitioners appealed the dismissal, the Tenth Circuit specifically noted that they did not appeal the ruling of lack of subject matter jurisdiction under the FTCA. (Pet., Appendix A, p. 3a: "Plaintiffs do not appeal the court's dismissal of Defendant CIA for lack of subject matter jurisdiction under the Federal Tort Claims Act.") Despite their assertion to the contrary (Pet., p. 2), Petitioners' failure to appeal this portion of the decision now makes the District Court's conclusion on FTCA jurisdiction the law of this case.

Nonetheless, Petitioners' own Statement of Facts amply demonstrates that they cannot avoid the effect of the FTCA statute of limitations. They set forth the following chronology: the accident occurred on July 20, 1994. Levys immediately determined that "The circumstances of the accident indicated that it was not a case of negligence, but was the result of an orchestrated plan or conspiracy. During the following months [,] the Levys attempted to collect the facts." Pet., p. 3. Petitioners had previously become suspicious "that they had been targets of the Central Intelligence Agency ever since Robert Levy worked for the National Radio Company in the 1960's." Pet. p. 4; *see also*, Pet. App. F, p. 29a, ¶ 38.

By their own admission, Petitioners knew of or suspected the CIA as the architect of the accident on the day it happened. Pet., p. 4. They had suspected a CIA plot since the 1960's, 33 years. *See* Pet., p. 4; p. 30a, ¶ 41. Even according them all benefit of the doubt, they admittedly had their suspicions confirmed a year after the accident, when they read *Defrauding America*. Pet., p. 3. This left them an

additional year to conduct whatever further investigation they wished and file a timely claim under the FTCA by July 1996.[6] They waited until May 1997, three years after their claim accrued.

Petitioners' contention that they were unaware of any legal basis or requirement to file their claim within two years of the accident was disposed of by this court in *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

Petitioners now claim that the district court denied them the opportunity to obtain or present evidence on the question of a timely claim. Pet., p. 10. They argue that they had no opportunity to show due diligence. *Id.*

The fact of the matter is that Petitioners argued their position thoroughly in pleadings to the District Court, Court of Appeals, and now this Court. *See,* Pet., p. 4. Their own statements of fact condemn their argument and establish lack of compliance with the Act as well as lack of diligence.

Petitioners have not hinted at any discovery which would rebut their own admissions. Any explanations or evidence they could possibly offer must already be in their possession, because it is all a matter of their own decision-making, not evidence someone else would have. No one but the Levys can explain why — given thirty-some years of experience and suspicions, plus their perceived confirmation of those suspicions in 1995 — they waited three years to send their claim to the CIA.

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6. Tort claims against the U.S. "forever barred" unless presented to appropriate federal agency within two years of accrual. 28 U.S.C. § 2401(b).

Petitioners' position is similar to that of the plaintiffs in *Gibson v. United States*, 781 F.2d 1334 (9th Cir., 1986), *cert. den.*, 479 U.S. 1054, 107 S. Ct. 928, 93 L. Ed. 2d 979 (1987). Gibsons sued municipal defendants and the FBI under several theories, including the FTCA, for (among other things) burning their garage in 1974. They waited until March 1979 to file their claim with the FBI, contending they were unaware of the Bureau's involvement in the fire until 1977. They maintained that the FBI actively concealed its involvement from them.

Gibsons knew that the fire was arson. This alone was sufficient to alert them to the fact of their injury (a burned garage) and its cause (fire) under the *Kubrick* test. The information they received shed no new light on either fact, it only identified the individual culprit, an FBI agent. The Court stated, ". . . plaintiffs would have us stretch the boundaries of the *Kubrick* decision to delay accrual of a federal claim until a plaintiff knows or has reason to know of the culpability of federal agents." 781 F.2d at 1344.

The *Gibson* court went on to note that under the FTCA, the cause of action accrues when the fact of injury (damage to garage in *Gibson;* injury and property damage in Levys' case) and immediate physical cause (fire in *Gibson*; auto accident in *Levy*) are known. Ignorance of involvement by federal employees is irrelevant. *Id.*

The court also noted that unless the Gibsons could establish fraudulent concealment, their claim was time barred. To prove fraudulent concealment, plaintiffs had to plead, with particularity, the circumstances surrounding the concealment and recite facts showing their due diligence in attempting to uncover those facts. The court found there was

no fraudulent representation because the plaintiffs knew about the incendiary device shortly after the fire. In addition, they failed to recite diligent efforts within the limitations period to identify the source of the fire.

The situation for the Levys is parallel. They knew of the fact of their injury and its cause on the day of the accident. Pet., p. 3. Their cause of action accrued that day. *Kubrick*, *supra*. Levys' "alleged ignorance of the involvement of United States employees was irrelevant." *Gibson*, 781 F.2d at 1344, *quoting Dyniewicz v. United States*, 742 F.2d 484, 487 (9th Cir. 1984).

The Tenth Circuit Court of Appeals correctly affirmed the District Court's dismissal of Petitioners' Complaint.

II.

PETITIONERS' PROPOSED AMENDMENT TO THEIR COMPLAINT WILL NOT CREATE JURISDICTION WHERE THERE IS NONE; IT WOULD BE FUTILE.

Petitioners initially assert that this court allows liberal amendment of complaints by *pro se* litigants under Federal Rule of Civil Procedure 15(a). They cite *Boag v. MacDugal*,[7] 454 U.S. 364, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982), and *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). *MacDugal* is not a Rule 15(a) case; does not refer to amendment of the Complaint; and, does not contain the quotation ascribed to it. *Compare,* Pet., p. 11. *Foman* is not a Rule 15(a) case, either. While the Court does hold that

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7. Cited by Petitioners as "*Boaz v. MacDugal.*"

"outright refusal to grant the leave [to amend] without any justifying reason" is an abuse of discretion, Levys omit the fact that the District Court in this case had ample reason for its refusal to allow amendment: the attempt would have been utterly futile.

In both *Levy I* and *Levy II*, the District Courts found that Petitioners' conspiracy allegations did not state a claim upon which relief could be granted. There were several reasons: there is no independent tort of civil conspiracy in New Mexico;[8] amendment would be futile (Pet., App. B, pp. 8a-9a); and, Petitioners apparently suffered no actual damages (Pet., App. B, p. 16a). The proposed new allegations in the proffered Second Amended Complaint (Pet., App. F, pp. 30a-33a) demonstrate no new allegations or reasons to change the District Courts' holdings. Even if Petitioners' contention regarding the Tenth Circuit's decision on their Rule 59 motion (App. A, at pp. 5a and 6a) were correct, a review of the proposed Second Amended Complaint (Pet., App. F) amply demonstrates that the Levys' latest efforts would also be futile.

The proposed Second Amendment does not correct any of the fatal defects in any of the previous complaints. Regardless, even an effective allegation of conspiracy would not overcome the fundamental flaw in Petitioners' case: they did not give timely notice to the CIA; their claim is forever barred. 28 U.S.C. § 2401(b).

As the Tenth Circuit noted, once the District Court properly dismissed the FTCA claim, it properly exercised

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8. *Levy II*, Appendix B, p. 15a; *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978).

its discretion to decline supplemental jurisdiction. Pet., App. A, p. 5a. The other decisions upon which Petitioners rely are distinguishable from the instant case in that in those cases, the courts were deciding issues where they had subject matter jurisdiction.

It is also worthy of note that Petitioners admit that they are not without a forum for their complaints against the non-federal defendants. They have already filed their Complaint in New Mexico State Court, *Levy III*. Pet., p. 6, fn. 1.

CONCLUSION

Petitioners' claims are neither new, novel, nor of "exceptional importance." They have long ago been litigated and decided. *E.g., Gibson, supra,* and *Dyniewicz, supra.* The District Court and Tenth Circuit correctly determined that there was no basis for federal court jurisdiction over their claims. Petitioners have received all the process which they are due. Denial of the Petition for Writ of Certiorari is appropriate. Petitioners have presented no valid reason to revisit the issues they attempt to raise.

Respectfully submitted,

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